No. 80878-3

SANDERS, J. (dissenting)—

> The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprizing and influential speculators; and snares to the more industrious and less informed part of the community.[1]

The lead opinion and concurrence claim Abbey Road Group's site development plan application does not vest to the legal requirements in place at the time of its filing under state statute or local ordinance. I agree. But that is the point: property owners are deprived their property absent that process due under our state and federal constitutions when government "den[ies] developers the ability to determine the ordinances that will control their land use." *W. Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986); *see also Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 871, 872 P.2d 1090 (1994) ("A developer controls the date of vesting by selecting the time at which he/she chooses to submit a completed building application.").

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[1] The Federalist No. 44 (James Madison).

With these principles in mind, the lead and concurring opinions cry out for an answer to a simple question: If Abbey Road had filed a building permit application without an approved site plan, would its right to build under existing ordinances vest at that time?

If the answer is yes, the majority is arguably consistent with *Erickson*; however, if the answer is no, we have a situation controlled by *West Main*. But the lead opinion and concurrence do not answer the question because they can't without demonstrating the incoherence of their analysis.

Abbey Road owns approximately 36 acres of property in the city of Bonney Lake (City). In June 2005 it began planning for the development of the Skyridge Condominiums, a 575 unit project consisting of 24 separate buildings. After meeting with city officials, Abbey Road embarked on the first step it was required to complete before it could move forward: obtain approval for a Type 3 site development permit. This Type 3 permit application is no trifling matter. An applicant must submit a SEPA checklist; a traffic impact analysis; a storm water report and detailed site plan, both of which must be prepared by a civil engineer; and a detailed landscaping plan prepared by a licensed landscaping architect, and pay a $3,674.00 application fee.

On September 13, 2005 Abbey Road submitted its application. It had taken three months and $228,000.00 for Abbey Road to reach this stage in its development project.[2] Later that very day, the City passed Ordinance No. 1160 rezoning Abbey

Road's land from C-2, which allows multifamily development, to RC-5, which doesn't. The City then told Abbey Road its application would not be processed because it could no longer build a multifamily development on its own property.

Abbey Road administratively appealed to the City's hearing examiner, who conducted a hearing and thereafter prepared findings of fact and conclusions of law. Pertinent to this dissent is finding of fact 18:

> While the City will not issue a building permit until the Director has granted Type 3 land use approval, nothing prohibits an applicant from submitting a building permit concurrent with the Type 3 application or at any time during the process. . . . .Thus, the past practices of the City confirms staff's testimony that applicants may file a building permit application at any time to include concurrently with the Type 3 permit application and vest their project. In the present case, the appellant did not file a building permit application and thus did not vest the project.

Clerk's Papers (CP) at 36. The portion of this finding regarding vesting is a legal conclusion, as is conclusion 3:

> The appellant could have filed a building permit application prior to October 3, 2005, and vested the project. . . .

CP at 38. Abbey Road assigned error to these and other factual findings and conclusions in its "LAND USE PETITION (RCW 36.70C) AND COMPLAINT FOR DAMAGES," timely filed in the Pierce County Superior Court. CP at 4.[3] We review conclusions of law mislabeled findings of fact de novo as conclusions of law. *Willener*

[2] Abbey Road estimates that it spent $128,000, not $96,500 as the majority claims. Pet. for Review at 3 n.3. Another $100,000 was spent on securing the option on the property. *Id.*

v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

The lead opinion holds forth *Erickson* as controlling and dismisses *West Main* as inapplicable. But the lead opinion's reliance on *Erickson* is misplaced, and its dismissal of *West Main* is based on the unwarranted and unstated assumption that Abbey Road could have filed a fully complete building permit and vested its rights without an approved Type 3 permit. Because as a matter of law Abbey Road could not have filed a *complete* building permit application to vest its rights without a Type 3 site plan approval, I dissent.

Washington's vested rights doctrine is founded in mandamus principles. In the very first case to expound the doctrine, we stated:

> A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance. The discretion permissible in zoning matters is that which is exercised in *adopting* the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. . . .
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> . . . An owner of property has a vested right to put it to a permissible use as provided for by prevailing zoning ordinances. The right accrues at the time an application for a building permit is made.

State ex rel. Ogden v. City of Bellevue, 45 Wn.2d 492, 495-96, 275 P.2d 899 (1954)

[3] The parties stipulated that Abbey Road's claim for money damages would be bifurcated from the Land Use Petition Act, ch. 36.70C RCW, side of the case to be decided thereafter. CP at 43-45.

(citations omitted). Four years later, we confirmed the doctrine in *Hull v. Hunt*:

> Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. . . . [T]he right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit.

53 Wn.2d 125, 130, 331 P.2d 856 (1958). A building permit is ministerial, not discretionary. When a developer submits an application for a building permit, his rights vest at the time of the application as long as the permit must be issued as a matter of right. The permit may be obtained by writ of mandamus.[4] *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 26, 385 P.2d 372 (1963); *Ogden*, 45 Wn.2d at 496. Our subsequent case law has established that a building permit issues by right if it is (1) complete and (2) complies with the relevant ordinances in place at the time of the application. *See*, *e.g.*, *Allenbach v. City of Tukwila***,** 101 Wn.2d 193, 200, 676 P.2d 473 (1984).[5] Our legislature has statutorily mandated a building permit

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[4] The lead opinion's discussion of mandamus is somewhat perplexing. It claims that "most land use decisions today involve at least some measure of discretion and are not subject to a writ of mandamus." Lead op. at 20. True enough, and no one claims that a site plan approval may be issued by writ of mandamus. *Id*. But the lead opinion makes no claim and cites no authority that a complete building permit application in conformity with applicable ordinances is *not* subject to issuance by mandamus. Does the lead opinion or concurrence claim filing an application for a discretionary permit vests rights? In an area where certainty is essential, the lead opinion is simply incoherent.

[5] More recent cases have added a third requirement, that the application is "filed during the effective period of the zoning ordinances under which the developer seeks

application must be "fully complete" to vest. RCW 19.27.095(1). "The requirements for a fully completed application shall be defined by local ordinance . . . ." RCW 19.27.095(2).[6] Thus, when a building permit application meets these requirements, the development rights are vested at the time of the filing of the application. *See Hull*, 53 Wn.2d at 130. But if an application is not fully complete, or does not comply with the relevant ordinances, it cannot be issued as a matter of right, and therefore development rights do not vest at the time of application. *See id.*

In *West Main* we recognized this doctrine in the context of a due process claim. We held that if a "[c]ity denies a developer the ability to vest rights until after a series of permits is obtained," the ordinance is unduly oppressive upon individuals and violates due process. *W. Main*, 106 Wn.2d at 52-53. This is entirely consistent with vesting rationale. A city cannot make completion of a building permit application contingent upon approval of preliminary permits because the city, not the developer,

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to develop." *See, e.g., Erickson*, 123 Wn.2d at 868. The source of this element is unclear, but it is entirely superfluous. Of course the ordinances at the time of filing, and thus vesting, are the controlling ordinances. That is the whole point of the vesting doctrine.

[6] Here it is important to note how the lead opinion and concurrence obscure this statutory requirement by stating, "The statute leaves to the local authority the determination of when a building permit is 'fully complete.' RCW 19.27.095(2)." Lead op. at 18. To the contrary under this statute whether or not a building permit application is "fully complete" is not a discretionary determination by a land use official but rather a question of law to be determined by operation of *local ordinance*.

would then have the discretion to determine the vesting date.

> The purpose of the vesting doctrine is to allow developers to determine, or "fix," the rules that will govern their land development. *See* Comment, *Washington's Zoning Vested Rights Doctrine*, 57 Wash. L. Rev. 139, 147-50 (1981). The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the "fluctuating policy" of the legislature. *The Federalist No. 44*, at 301 (J. Madison) (J. Cooke. ed. 1961). Persons should be able to plan their conduct with reasonable certainty of the legal consequences. [Charles B.] Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960). Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.
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> > Of course, all institutions, including government, like to keep options open. But while keeping options open normally involves a price, government can keep its options open at no cost to itself in the vesting game because virtually all the risk of loss is initially imposed on the developer. Unfortunately, that loss is still a social cost, ultimately borne by all, whether or not government recognizes it.
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> (Footnote omitted.) [Donald G.] Hagman, *The Vesting Issue: The Rights of Fetal Development vis a vis The Abortions of Public Whimsy*, 7 Envtl. L. 519, 533-34 (1977).

W. Main, 106 Wn.2d at 51. Bellevue's vesting ordinance violated due process because it took away the developer's right to vest at a time of his choosing by conditioning vesting on discretionary preapplication procedures. Although Bonney Lake does not have a vesting ordinance as such, in substance it does the same as Bellevue by making it impossible to vest a building permit application until discretionary site plan approval is obtained from the city.

The lead opinion claims *Erickson* is controlling. Lead op. at 9. In *Erickson* the constitutionality of a city ordinance was challenged. *Erickson*, 123 Wn.2d at 869. The ordinance mandated a Master Use Permit (MUP) would not vest development rights until (1) a fully complete building permit was filed or (2) the MUP was approved. *Id*. We held that due process was satisfied in *Erickson* because "[a]t any point in the MUP review process a developer can file a *complete* building permit application. The developer's rights then vest . . . . ," *id*. at 870 (emphasis added) and "[u]nder Seattle's ordinance, Erickson could have protected its rights by filing a building permit *at the beginning or at any point in the process*," *id.* at 871 (emphasis added). Our decision in *Erickson* was thus premised precisely on the ability of the developer under the Seattle ordinance to file a fully complete building permit application "[a]t any point in the MUP review process" and so unilaterally control the date of vesting. *Id.* at 870. The lead opinion asserts that, like Erickson, Abbey Road could have filed a building permit application at any point. However filing an incomplete application vests nothing. Therefore *Erickson* is controlling only if Abbey Road could have controlled the date of vesting without Type 3 permit approval.

Here, like *West Main*, Bonney Lake created an administrative hurdle to Abbey Road's ability to vest. Our vesting law requires a "fully complete building permit application," as defined by local ordinance. RCW 19.27.095(1). The Bonney Lake Municipal Code (BLMC) gives authority to the director of planning and community

development, the director of public works, and the building official to administer and enforce BLMC Title 14, "including decisions on Type 1 – 3 permits as set forth in Chapter[] . . . 14.50 BLMC."[7] BLMC 14.10.070(A). According to BLMC 14.50.010, "The applicant shall complete the appropriate application form and submit application, environmental checklist, and applicable fees to the director(s). *The application form shall specify the submittal requirements*." BLMC 14.50.010 (emphasis added). Thus the director has authority to summarize code requirements in an application form, but he doesn't have authority to change those code requirements, no matter how he crafts his form. Here the form reflected the ordinance requirement that a fully complete building permit application include an approved Type 3 site development plan. AR Exs. 27, 28. This was in strict accordance with the requirement of local ordinance. BLMC 14.50.060(C) ("No building permit shall be issued for work requiring a Type 3 permit until the 15-day appeal period has lapsed."); BLMC 14.90.020(D) ("If one permit cannot be reasonably processed until another is issued, such as a building permit . . . , the 120 days within which a notice of decision must be issued for contingent permit . . . shall not begin until the other permit has been issued.").[8]

[7] Title 14 Development Code of the Bonney Lake Municipal Code is attached as "III.3. City Ordinances" to the Administrative Record herein.

[8] The lead opinion claims the problem with Abbey Road's reliance on West Main's holding that local discretion interfering with the developer's unfettered right to vest this project when he sees fit violates due process "is that Abbey Road has not identified any similar ordinances in the BLMC." Lead op. at 14. These ordinances which require site plan approval as a condition precedent to the issuance of a building

No one contends Abbey Road could have received building permit approval absent Type 3 permit approval, although the lead opinion and the concurrence try to finesse the point. An incomplete building permit does not vest as a matter of right. *Hull*, 53 Wn.2d at 130; *Ogden*, 45 Wn.2d at 495-96. The city thus passed an ordinance which removed the unrestricted ability of the property owner to vest, the result which *West Main* found violates due process.

The lead opinion admits that the building permit application form states that an approved site plan *must* be submitted with the building permit application, lead op. at 15, but points to the "N/A" box next to the site plan requirement on the building permit form, as if to say (but not really saying) if the site plan isn't approved yet, just check the box, submit the application, and vest your rights Lead op. at 17. But here the lead opinion and concurrence slip gears. They apparently assume a *fully complete* building permit application could have been filed without an approved Type 3 site plan if the developer checks the N/A box. *Id.* Every requirement on the building permit application has an N/A box next to it. Pet. for Review at 17 n.11. Can applicants simply check all the N/A boxes, submit the "complete" building permit application, and vest their rights?[9] If the lead opinion or concurrence is holding that, let them

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permit do exactly that.

[9] The lead opinion points to a number of instances where the city processed Type 3 permit applications and building permit applications simultaneously. Lead op. at 16-17. These examples are meaningless, since none of them involved any dispute over vesting. AR Report of Proceedings at 99. The fact that the city may have processed

plainly say so. Double talk does not provide the date certain vesting required by due process. "[A]dherence to the constitution requires more than clever word play." *In re Dependency of K.R.*, 128 Wn.2d 129, 148, 904 P.2d 1132 (1995) (Johnson, J., dissenting).

Moreover the hearing examiner expressly found "the information requested for a building permit must be submitted in order for a complete application." CP at 33. The examiner based this finding on a letter from the city that stated unequivocally, "[A]ll information requested on the application forms (Building Permit and Planning Department) shall be submitted in order for a complete application." *Id.* Thus it is the City's understanding by operation of law that an application would not have been fully complete unless the approved site plan was included. Moreover, the examiner also found "[w]hile the City will not issue a building permit until the Director has granted Type 3 land use approval, nothing prohibits an applicant from submitting a building

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the applications simultaneously has no bearing on whether the original building permit application would have been complete for vesting purposes. Notably, no building permits were ever issued without prior approval of a site plan. The lead opinion claims that these instances merit "due deference to the local authority's construction of the law within its expertise." Lead op. at 6. However no deference is due agency legal arguments construing its own ordinance. Rather deference is limited only to agency practices which historically enforce its ordinances. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). Here the pattern of prior agency enforcement demonstrates that building permits will not issue absent an approved site development plan, illustrating exactly the reason why a building permit application cannot vest absent this mandatory component.

permit concurrent with the Type 3 application or at any time during the process." CP at 36. This may be true; however, rights vest upon submitting a building permit application only if it is fully complete and the building permit must thereafter issue as a matter of right. *Hull*, 53 Wn.2d at 130. Put a different way, a building permit vests rights only if it is fully complete satisfying all ordinance requirements for issuance. *See* RCW 19.27.095; *Hull*, 53 Wn.2d at 130; *Ogden*, 45 Wn.2d at 495; *Allenbach***,** 101 Wn.2d at 200. The Bonney Lake land use code requires Type 3 approval before a building permit can legally issue; therefore a building application would not have been fully complete without the Type 3 permit approval. And the building permit could not issue because it didn't comply with this ordinance requirement. The concurrent submission of a Type 3 site plan application and a building permit application could not have vested Abbey Road's rights as a matter of law because Abbey Road could not file a *fully complete* building permit application to vest its rights without first getting the City's approval of the Type 3 permit application. And if Abbey Road did not have the ability to choose its date certain for vesting independent of the City's approval of a preliminary permit, it was deprived of its constitutional right to be "protected from the 'fluctuating policy' of the legislature." *W. Main*, 106 Wn.2d at 51 (quoting The Federalist No. 44, at 301 (James Madison) (J. Cooke ed. 1961)).

In summary, unlike *Erickson*, but very much like *West Main*, Abbey Road could

not unilaterally control the date this project vested as required by the due process clauses of our state and federal constitutions. Even if Abbey Road could have submitted a building permit application at the outset, before the zoning ordinance was amended, it could not have submitted an approved site plan as part of that application because that required the subsequent discretionary approval of the City of Bonney Lake. Therefore, according to all the preexisting precedent of this court as well as the statutes of this State, a building permit application submitted without a site plan approval could not be "fully complete." Unlike *Erickson,* Abbey Road could not have unilaterally vested anything under this ordinance scheme.

The problem with the lead and concurring opinions is not only that they come to the wrong conclusion, but they muddle and finesse an area of the law where certainty is critical. The State and localities have a great deal of discretion to determine by ordinance what the rules shall be. But the property owner has a constitutional right to proceed under current ordinances by submitting a complete building permit application to vest its rights at any time of its choosing. When the government prevents him from doing this, it deprives the developer of his property without due process of law. I would remand to the superior court for appropriate relief consistent with this opinion.

I dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice James M. Johnson

Justice Tom Chambers